

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RICHARD X. AND CHRISTEL BOVE	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985 and 1986.	:	

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Petitioners, Richard X. and Christel Bove, 135 Noe Avenue, Chatham, New Jersey 07928, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1986 (File No. 806824).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on April 30, 1990 at 1:15 P.M. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioners timely filed a petition for redetermination of a deficiency for the years in question.

FINDINGS OF FACT

Petitioners, Richard X. and Christel Bove, were residents of New Jersey and were not residents of New York State during the years 1985 and 1986.

On October 26, 1987, the Division of Taxation (the "Division") wrote a letter to petitioners advising them that their 1985 and 1986 New York State personal income tax returns had been selected for audit. The letter requested that petitioners bring to the Division's New York District Office on the appointment date indicated their books and records relating to the years at issue, including verification concerning the allocation of days worked outside New York State. The letter was addressed to petitioners at a New Jersey address. Upon receiving

the Division's letter, Mr. Bove immediately responded by letter indicating that he had changed his residence to Florida and would be unable to meet with the auditor on the appointment date because of such change, but would attempt to obtain the requested information from his previous employers. On March 29, 1988, Mr. Bove wrote to his two previous employers in New York City requesting all expense reports submitted during 1985 and 1986. Mr. Bove did not receive a response to his requests from either employer.

On July 27, 1988, the Division of Taxation issued to petitioners a Notice of Deficiency asserting deficiencies for 1985 and 1986 in the aggregate amount of \$11,512.25, plus penalty and interest. The notice was addressed to petitioners' Florida address.

At the hearing, petitioner Richard Bove testified that he received the Notice of Deficiency and, within two days of its receipt, filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioner testified that the request was sent by ordinary mail. The Bureau of Conciliation and Mediation Services has no record of receiving this request.

On March 22, 1989, petitioners filed a request for a conciliation conference that was received by the Bureau of Conciliation and Mediation Services on March 27, 1989. The request referred to assessment numbers relating to the year 1986. In response, the Bureau of Conciliation and Mediation Services issued Conciliation Order #94749 on April 21, 1989 for the year 1986. This order denied petitioners' request for conciliation conference upon the basis that the request therefor was filed in excess of 90 days after the issuance of the Notice of Deficiency and therefore was not timely filed.

On December 20, 1989, petitioners sent a letter to the Bureau of Conciliation and Mediation Services which was treated by the Bureau as a request for a conciliation conference. The letter and attached documents referred to assessment numbers for the years 1985 and 1986. On March 2, 1990, the Bureau of Conciliation and Mediation Services issued Conciliation Order #102007 for the years 1985 and 1986. This order also denied petitioners' request for a conciliation conference upon the basis that the request therefor was filed in excess of 90 days

after the issuance of the Notice of Deficiency and therefore was not timely filed.

On April 13, 1989, petitioners filed with the Division of Tax Appeals a petition for a hearing. Subsequently, on May 9, 1989, petitioners filed with the Division of Tax Appeals a second petition for a hearing.

At hearing, the Division offered in evidence an affidavit of the Principal Clerk of the Manual Assessments Unit, charged with the duty of supervising the issuance of notices of deficiency such as the one at issue. Attached to this affidavit was a copy of the notice in question as well as the Division's certified mail record relative thereto. The affidavit describes the specific process by which such notices are mailed, and provides details as to the mailings of the subject notices. The affidavit states such notices are issued via certified mail, that a certified mail record is inspected and stamped by the U.S. Postal Service on the date of mailing, and that the Division does not request, demand or receive individual return receipt cards from each individual certified (or registered) piece of mail issued. The attached certified mail record describes the notice in question by reference to a certified control number, lists petitioners by name and address and indicates that an item was mailed to petitioners on July 27, 1988 by way of a U.S. Postal Service stamp. The certified control number is also shown on the top of the Notice of Deficiency.

#### CONCLUSIONS OF LAW

A. Tax Law § 681(b) provides that:

"After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section six hundred eighty-nine."

B. Effective September 1, 1987, the administrative adjudicatory functions of the former State Tax Commission were assumed by the then-newly created Division of Tax Appeals. As of such effective date,

"[a]ll proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency..." (Tax Law § 2008).

Further, Tax Law § 2006(4) provides that:

"[T]he liability of such person [who seeks review of taxes claimed to be due] shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing...." (Compare Tax Law § 681[b].)

C. As an alternative to petitioning for a hearing in the Division of Tax Appeals, a taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" (see 20 NYCRR 4000.3[a]).

The Bureau of Conciliation and Mediation Services is responsible for providing the conferences which had formerly been conducted by the State Tax Commission (Tax Law § 170.3-a). Tax Law § 170.3-a(a) provides, in part, that the Bureau shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

The "time to petition for such a hearing" language of Tax Law § 170.3-a imposes the statutory 90-day petition time period upon the request for conciliation conference alternative. The timely filing of a written request, and one conformed copy, with the Bureau "suspends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

D. Pursuant to these provisions, petitioners had 90 days from the date the notices were issued (July 27, 1988) to either request a conciliation conference or file a petition for a hearing. The request for a conciliation conference that petitioner claimed to have mailed within two days of receipt of the Notice of Deficiency cannot be considered a timely protest. Even assuming, without deciding, that petitioner's testimony was sufficient to establish proof of ordinary mailing, such proof is insufficient as a matter of law to prove timely filing where there is no actual delivery of the request. Petitioner was unable to establish that the request had been filed within 90 days after July 27, 1988 as prescribed by Tax Law §§ 170.3-a, 681(b) and 691(a), and was therefore not timely filed (see, Matter of Martin E. Messinger, Tax Appeals Tribunal, March 16, 1989; Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988).

As for the request and petition that were received, neither was filed in a timely manner. Petitioners' request for a conciliation conference was filed March 22, 1989, or 266 days after the issuance of the Notice of Deficiency. The petition was filed on April 13, 1989, or 284 days after the issuance of the Notice of Deficiency. As petitioners did not timely file their request for a conciliation conference or timely file their petition, there is no jurisdiction herein to address the substantive merits of petitioners' case (Matter of Lawrence and Dory Rosen, Tax Appeals Tribunal, July 19, 1990; Matter of SAK Smoke Shop, Inc., Tax Appeals Tribunal, January 6, 1989).

E. The petition of Richard X. and Christel Bove is dismissed.<sup>1</sup>

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

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<sup>1</sup>It should be noted that petitioners are not entirely without redress in that they can still obtain a hearing on the merits of their case by paying the tax and interest due now, filing a claim for refund within two years from the time of such payment (Tax Law § 687[a]) and thereafter (assuming the claim for refund is denied or is not acted upon within six months of the date it is filed and thus is deemed denied) filing a petition contesting such denial of refund pursuant to Tax Law § 689(c).